



Welcome to the June 2017 Mental Capacity Report. Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Report: standing in the shoes of P in a difficult decision as to cancer treatment, s.21A and the LAA, Welsh DoLS and Sir James Munby P on the warpath;
- (2) In the Property and Affairs Report: Charles J puts statutory wills under the spotlight and new OPG guidance on travel costs;
- (2) In the Practice and Procedure Report: the minutes of the Court of Protection Court Use Group;
- (3) In the Wider Context Report: an election corner special report, new resources for GPs and about ADRTs, psychiatric treatment under scrutiny from Europe and moves to secure greater cross-border protection for adults;
- (4) In the Scotland Report: important perspectives on supported decision-making, independent living and legislative reform;

Remember, you can find all our past issues, our case summaries, and more on our dedicated sub-site [here](#), and our one-pagers of key cases on the SCIE [website](#).

You are also invited to our 10th birthday party for the MCA 2005 to be held on 29 June, with the keynote speech to be delivered by Baker J and a packed programme of talks and masterclasses concerned with key aspects of the Court of Protection's work and future. For details, and to book, see [here](#).

Editors

Alex Ruck Keene
Victoria Butler-Cole
Neil Allen
Annabel Lee
Anna Bicarregui
Nicola Kohn
Simon Edwards (P&A)

Scottish Contributors

Adrian Ward
Jill Stavert

The picture at the top, "Colourful," is by Geoffrey Files, a young man with autism. We are very grateful to him and his family for permission to use his artwork.

Contents

HEALTH, WELFARE AND DEPRIVATION OF LIBERTY	3
Appeals update	3
Putting yourself in the shoes of P.....	3
Section 21A appeals – LAA pitfalls.....	5
Welsh DoLS figures	5
The President on the warpath.....	6
PROPERTY AND AFFAIRS	7
Statutory wills under scrutiny	7
OPG Practice Note on travel costs	9
PRACTICE AND PROCEDURE	11
Court of Protection User Group Minutes	11
Serious Medical Treatment cases and litigation friends.....	11
Potential new role for the Court of Protection	11
THE WIDER CONTEXT	12
Election Corner	12
Royal College of GP Safeguarding Adults E-Learning	13
Advance Decisions pack published.....	13
Update about assisted dying challenge.....	14
European Committee for the Prevention of Torture UK report published.....	14
Cross-border protection of vulnerable adults: the EU en marche?	14
My Life Films	16
SCOTLAND	17
Editorial Note	17
Powers of Attorney	17
The “bedroom tax”, a procedural point, and possible human rights issues.....	17
Draft General Comment on Article 19 of the UN Convention on the Rights of Persons with Disabilities (“CRPD”)	19
<i>Mental Health and Capacity Law: the Case for Reform</i> Report.....	20
Supported decision-making: learning from Australia	22

HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

Appeals update

To the considerable surprise of the editors, the Supreme Court has refused permission to appeal in the *Ferreira* case concerning deprivation of liberty in the intensive care setting. The judgment of the Court of Appeal is therefore authoritative and binding as concerned the very limited place of deprivation of liberty in the context of urgent life-saving medical treatment.

The Court of Appeal will be considering in July the appeal against the decision of Charles J in *Briggs* that he could consider the question of whether CANH was in Mr Briggs' best interests within the four walls of a s.21A application (and the consequential funding implications)

We still await the decision of the Court of Appeal in the *Birmingham CC v D* case heard in February concerning the ability of parents to consent to the confinement of their children.

Putting yourself in the shoes of P

The Acute Trust v R & The Mental Health Trust [2016] EWCOP 60 (Baker J)

Best interests – medical treatment

Summary

This application, heard before Christmas, but only recently appearing on Bailii, concerned a 40-year old man (R) suffering from chronic paranoid schizophrenia who had been diagnosed with an incurable brain tumour. The acute trust responsible for his care sought a declaration that

it was lawful and in his best interests not to undergo treatment for the tumour but rather to be provided with palliative care only.

R had a long history of mental health problems. He had been admitted to hospital under s.3 MHA 1983 on a number of occasions and had been in hospital continuously for nearly six years. His illness was characterised by a range of paranoid delusional beliefs and abnormal perceptions, including the belief that he was being interfered with by other people. He had also exhibited intermittent hostile and threatening behaviour.

There was an uncontested assessment as to his capacity holding that he lacked capacity to conduct the proceedings or to make medical decisions about the medical treatment for his brain tumour by reason of the disturbance in the function of his mind or brain. R had been inconsistent about whether or not he has a tumour, on occasions accepting that he has, on other occasions denying it.

Standard treatment for R's brain tumour would be for the tumour to be removed by surgery and for the patient, thereafter, to receive a course of daily radiotherapy over a period of six weeks and possibly chemotherapy thereafter. The tumour was considered to be not curable so the aim of treatment would be to prolong his life and maintain his quality of life.

The judge noted that surgery had side effects which were exacerbated by the fact that R was overweight and because of his psychotic condition, it would be hazardous to use dexamethasone, a drug commonly used to reduce the risk of brain swelling post-operatively. Both radio therapy and chemotherapy also had side effects but the more important consideration on the facts of this case was that R would have to be compliant with the sessions of radiotherapy and chemotherapy.

The view of the clinicians and in particular the consultant oncologist was that the risks of the treatment were too high in relation to its potential benefits. R's psychiatrist considered that managing R in the pre-, peri- and post-operative periods would be very difficult, that the treatment would create a significant risk to R and would be likely to cause him distress which would exacerbate his mental health

symptoms. R's family agreed with the view of the clinicians.

Baker J referred to ss.1(5) and 4 of the MCA 2005 and quoted the relevant passages of the Mental Capacity Act Code of Practice (paras 5.31 – 5.33). He also cited the Supreme Court case of *Aintree University Hospitals NHS Foundation Trust v James* [2014] AC 591 and in particular these paragraphs from the judgment of Baroness Hale of Richmond:

the starting point is a strong presumption that it is in a person's best interests to stay alive... this is not absolute. There are cases where it will not be in a patient's best interests to receive life-sustaining treatment (para 35)

and

The most that can be said, therefore, is that in considering the best interests of this particular patient at this particular time, decision-makers must look at his welfare in the widest sense, not just medical but social and psychological; they must consider the nature of the medical treatment in question, what it involves and its prospects of success; they must consider what the outcome of that treatment for the patient is likely to be; they must try and put themselves in the place of the individual patient and ask what his attitude to the treatment is or would be likely to be; and they must consult others who are looking after him or interested in his welfare, in particular for their view of what his attitude would be (para 39).

The acute trust had completed a balance sheet exercise which concluded that taking account of all relevant factors, it was not in R's best interests to undergo surgery and or radiotherapy and or chemotherapy, so that he should be provided with palliative care only. A factor pointed to by the trust was that, insofar as he had expressed any wishes, he had said that he does not want to have the treatment,

although, he had been inconsistent in what he had said about those matters.

The Official Solicitor's view was that it was the risk of starting but not completing radiology that was the key factor. The Official Solicitor submitted that this was a very difficult decision because of R's young age and because the possibility of the treatment may afford him considerably longer life than he would be likely to have if the application were granted and the tumour is allowed to take its course. However, on balance, the Official Solicitor concluded that the consequences of starting a course of radiotherapy to his brain would be so injurious to his mental health and wellbeing and so unpleasant that it was appropriate to conclude he should not, in his best interests, undergo such a course of treatment.

Baker J granted the application. Having regard to all the circumstances, in particular the probability that R would not cooperate and the likely significant adverse side effects of the treatment on his mental health, it was in his best interests, in the widest sense, to make the declaration that was sought in this case.

The judge agreed with the analysis put forward on behalf of the trust. He held that there was a strong presumption that it was in a person's best interests to receive life-sustaining treatment. However, looking at R's welfare in the widest sense (*Aintree*), he considered that the balance plainly came down against surgery, radiotherapy, and chemotherapy. The treatment was not merely surgery but also involved post-operative care, radiotherapy, and chemotherapy. It was the whole course of treatment that must be considered in making the decision.

Baker J stated that if he were to put himself in R's position (as per *Aintree*), he considered it highly likely that he would not choose to have the surgery. Were he to start the treatment, he would suffer significant adverse effects, both in terms of the effects of the medication upon him, but also as a result of his likely non-compliance. Thus, the prospects of the treatment succeeding would be very much diminished. In any event, the evidence suggested that he would not be cured by the

treatment. At most, his life would be extended for a period.

Comment

This case is another example of the *Aintree* judgment being followed with a judge putting himself in P's position, in this case leading to the refusal of medical treatment. Interestingly, however, in this case, and whilst (in a similar fashion to Charles J did in *Briggs* at almost exactly the same time) Baker J expressly framed his decision by reference to what P would have chosen, in this case, the choice was not driven solely – or even primarily – by P's identified wishes and feelings in relation to the proposed treatment. The case is therefore a useful reminder that it can be possible to construct a best interests decision even in the face of inconsistent wishes.

Section 21A appeals – LAA pitfalls

Readers will recall an email we reproduced from the LAA to Peter Edwards of Peter Edwards Law in which the LAA made clear that their position is that where there is no standard authorisation in place, there can be no means-tested funding. We reproduce a further email which confirms that position, and also the knock-on effect on the funding of any expert who may have been instructed whilst an authorisation was in place. The approach being adopted by the LAA here is extremely hardline, and it serves as a crucial reminder that any representatives involved in s.21A applications must ensure that the supervisory body either extends or takes steps to bring about a fresh authorisation so as to ensure that there is in place a 'live' authorisation throughout the period of the s.21A application.

Apologies for the delay in getting back to you and thank you for your patience. As requested, here is an update of the LAA's position and guidance for future reference:

Although it is the responsibility of the supervisory body to extend the standard authorisation and you are not in control of whether this happens or not, the

authorisation does have an expiry date which you would of course be aware of. It is considered reasonable to check the status of the authorisation at the point of expiry in order for you to be clear about the funding position. Whilst you would not be on notice that funding would be withdrawn, you are aware of the conditions of non-means tested funding, The Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 Regulation 5 (1) (g) specifically state that non-means tested funding applies to the individual in respect of whom an authorisation is in force, which was not the position here at the relevant time.

In terms of the experts fees, it is considered that the amount of this liability would be limited to that of a cancellation fee at the point that the authorisation expired. At this point there was a duty (Clause 2 Standard Terms) to restrict the LAA's liability so that only a cancellation fee would be payable on expiry of the standard authorisation.

Welsh DoLS figures

The Care and Social Services and Healthcare Inspectorates in Wales have jointly produced the seventh annual DoLS monitoring [report](#) for 2015-16 for the 22 local authorities and 7 Health Boards. Amongst their headline findings were:

- DoLS applications rose by 15% from 10,681 in 2014/15 to 12,298 in 2015/16, although there was wide regional variation.
- 74% of applications combined with urgent authorisations exceeded the 7-day timeframe (with 54% exceeding the 14-day maximum) and two councils did not meet the timescale for assessments on any of the urgent applications they received. On the Isle of Anglesey it took 263 days on average for a standard with urgent authorisation application to be dealt with.
- 73% of standard applications were processed beyond the 21-day maximum timescale.

-
- The average authorisation rate across councils was 56% and for health boards the figure was 38%.
 - Part 8 reviews during the authorised period remained low at only 1% of authorisations. The vast majority of authorisations lapsed before the review took place.
 - Of the 12,298 applications, 336 had an Independent Mental Capacity Advocate appointed and 39 were referred to the Court of Protection (nearly half of which had an IMCA appointed).

home.' Sir James also said it was 'a profound indictment of our society' that elderly couples who had been together for decades were not always able to have shared accommodation and were required to spend their last years apart.

As for England, this makes depressing (although unsurprising) reading. Prioritising the urgent applications has had a knock-on effect on the time taken to process standard applications. Most areas have significant backlogs. The length of authorisation is increasing, whilst the availability of review is decreasing. Very few authorisations are being challenged in the Court of Protection. Half of those challenged demonstrate IMCAs making a difference.

The President on the warpath

There was considerable media coverage of a speech by Sir James Munby to the Association of Directors of Adult Social Services (a transcript of which does not at present appear to be publicly available) in which he criticised placing elderly people in care homes, prioritising their physical safety over their emotional wellbeing. In reported comments which will come as no surprise to anyone who has quoted the judge's famous phrase from 2007 – what good is it making someone safer if it merely makes them miserable? – Sir James observed that 'It is no good just saying most people would prefer to live longer in nice new accommodation without breaking their neck; some people would not.' He went on to say 'You are actually putting someone in a regime which may not allow them to smoke, or a regime where for their own good they may be required or heavily persuaded to indulge in the kind of collective jollification which they would have loathed at

PROPERTY AND AFFAIRS

Statutory wills under scrutiny

ADS v DMS & Ors [2017] EWCOP 8 (Charles J)

Statutory wills

Summary

In this case Charles J heard an appeal lasting three days with an additional day for judgment against an order authorising the making of a statutory will. On the appeal, each of the four parties appeared by counsel, P by her litigation friend, the Official Solicitor, was represented by leading and junior counsel. Charles J allowed the appeal principally on the grounds of very serious procedural errors. The judgment is critical of all parties. The criticisms of the Official Solicitor are particularly sharp.

The facts are complex and unlikely to be repeated. The parties to the statutory will application were JKS (P), MH (P's property and affairs deputy and the applicant) and JKS's two sons (ADS, the appellant), and DSM.

The key background to the application for the statutory will was the fact that JKS, whilst still capacitous, had taken proceedings in the Chancery Division against one of her sons (ADS). In those proceedings, JKS made serious allegations against ADS and his wife alleging undue influence concerning the transfer of various properties.

During the course of the Chancery proceedings, JKS lost her capacity to litigate and MH was appointed her litigation friend. In June 2014, the Chancery proceedings were settled and the settlement was, of course, approved by a Chancery Division judge. One of the terms of the agreement was that MH would apply to the Court of Protection to be appointed deputy for JKS to manage her property and affairs and, once appointed, apply for a statutory will to be made on behalf of JKS that divided JKS's estate in the United Kingdom between ADS and DSM equally.

MH duly applied to the Court of Protection for a statutory will to be made on JKS's behalf in those terms. The Court of Protection made an order that JKS be a respondent to that application and that she be represented by the Official Solicitor as her litigation friend.

The Official Solicitor, strongly, took the view that the proposed statutory will was inappropriate because it did not reflect JKS's wishes and feelings. Charles J summarised the Official Solicitor's submissions at paragraph 67 of his judgment, namely that the settlement agreement was a factor but not a magnetic factor and did not preclude JKS from relying without any change in circumstances on expressions of JKS's wishes and feelings based on the allegations made in the Chancery Division proceedings and that it was not in JKS's best interest for her will to make the provisions set out in the Chancery Division settlement.

At paragraph 68, Charles J indicated that if that approach was right, it introduced into the Court of Protection proceedings a need to consider whether, and if so, which of the wide ranging disputed allegations that had been made in the Chancery Division proceedings needed to be resolved and the need to distinguish between agreed and established facts and allegations and the need to consider what if any influence the background disputes and JKS's family were having over JKS's expressions of her wishes and feelings from time to time.

At paragraph 69, Charles J stated that there had been a continuing failure by the Official Solicitor as JKS's litigation friend to recognise or sufficiently recognise these points.

Of general interest are early passages in the judgment concerning the approach of the court to the making of a statutory will. These are at paragraphs 9 to 25. Of particular importance are the passages that deal with how the court should approach P's wishes and feelings especially in circumstances where those wishes and feelings had been expressed at a time when P has lost capacity or where P may have been

the subject of influence. At paragraph 15, Charles J said,

So, in my judgment an approach to the respective weight to be given to expressions of P's testamentary wishes that failed to take account of P's capacity when they were made and so, amongst other things:

- (i) P's ability at the relevant times to take account of relevant past and present circumstances;*
- (ii) The factual accuracy of reasons expressed by P at the relevant times;*
- (iii) Any influences to which P may be subject at the relevant times and*
- (iv) The way in which P's wishes and feelings have been obtained*

would not comply with the approach dictated by the MCA.

At paragraphs 23 to 25, Charles J applied those principles to the particular facts of this case and held at paragraph 26 that the judge had erred in principle by failing to carry out the approach he described or failed to take relevant features of the case into account. Of particular interest is the statement Charles J made at paragraph 25 to the effect that the Court of Protection (and thus P's litigation friend) when making or advancing a decision under s.16 MCA 2005 on behalf of P ought to be as honest as other people and so should take into account whether giving weight or effect to any of P's statements of wishes and intentions would found an unconscionable result. Here he drew on the role of a trustee in bankruptcy and the *ex parte James* principle that requires trustees in bankruptcy not to act unconscionably (see *Re Condon, ex parte James* [1874] 9 Ch. App. 609 at 614).

Charles J then analyses at length what happened before the Court of Protection judge and what went wrong and, principally, that is that the Court of

Protection judge placed too little weight on the Chancery Division settlement agreement, failed to distinguish between allegations and facts and held, at paragraph 134, that a decision on the terms of JKS's will that was founded or placed weight on expressions of testamentary wishes that ADS should not inherit for reasons based on the allegations in the Chancery Division proceedings would be unconscionable. He went on to say at paragraph 135, however, that what would be a relevant change of circumstances to trigger the ability of JKS to rely on these allegations would be fact sensitive and might include further problems in the relationship between ADS and his mother which might be a trigger to return to the history.

Paragraphs 153 to 157 deal with what the result of allowing the appeal should be. Charles J indicated that he would deal with interim relief at the handing down of the judgment and then he dealt with the submission that he should settle the terms of the statutory will himself on the basis of additional information that had been provided to him and the evidence before the Court of Protection judge. He said, however, he could not do that without the parties addressing what facts they were seeking to prove and what matters should be left as allegations and so addressing the basic litigation need to distinguish between agreed and established facts and allegations and so the facts that each litigant seeks to prove. The judgment does not reveal what happened next.

At paragraph 159, Charles J made some final comments of lessons to be learnt which included:

1. The need to identify the issues of fact and law;
2. The need to carefully consider how professionals who are asked to ascertain the wishes and feelings of P should be instructed and approach their task;
3. When a settlement of civil proceedings is approved on behalf of a protected party who will or may become the subject of proceedings before the COP, the need to consider carefully

what should be explained to a civil court asked to approve the settlement on behalf of P, what that court should be invited to consider and explain about its approach to the approval of the settlement, how that is to be recorded, whether the settlement is dependent on a particular outcome in the COP and more generally how the COP will be invited to approach the settlement that P has entered into with court approval, how P's wishes and feelings (as a protected party) about the settlement should be sought and recorded, and who the likely parties to the COP proceedings will be and

Although I understand that the approach taken in this case of joining P as a respondent and inviting the Official Solicitor to act as P's litigation friend works well in a great number of applications for a statutory will, there may be a need in some cases for the COP when making that invitation to the Official Solicitor and for the Official Solicitor when deciding whether or not to accept it to consider whether a professional deputy should make the application for P or act for P at least until it is made clear whether there is or is not a dispute.

Further in Part 3 of the Second Schedule to the judgment, Charles J listed what were the lack of directions identifying the issues. This had led in this case to no proper identification of the issues of fact and law and had put the trial judge in a difficult position which was compounded by the fact that she had not received a copy of the bundles before the start of the hearing and had to rise to read them.

At paragraph 36, Charles J made a list of fourteen matters which the representatives of the parties needed to consider with care arising from the background to that particular case and its wide ranging disputes. Critically, Charles J stated that none of the represented parties had taken into account any of the factors. The factors included such basic matters as what facts were common ground or could be established without oral evidence, what facts

needed to be proved, what oral evidence should be given and so how Rule 90 was to be applied (concerning hearings in private) and what matters could be left as disputed allegations.

Comment

The judgment is silent as to the costs of the appeal but the costs of these proceedings must have been very substantial. As noted, it is not clear from the judgment either whether the parties were able to come to an agreement as to the court's approach to allow Charles J to settle a statutory will or whether the matter will, now, go off for a very extensive fact finding exercise. Perhaps the most important lesson to be learned from this very sorry tale is that where it is said that P's stated wishes and feelings are the result of want of capacity or possibly influence, the court should not blindly act on those stated wishes and feelings but may need to investigate the extent to which those wishes and feelings are soundly based or the product of influence.

OPG Practice Note on travel costs

The OPG published on 1 June a [Practice Note](#) (PN9) outlining how it will supervise claims made under Paragraph 21 of PD19B by public authorities and other third sector deputies for travel costs. Any potential claims made for such costs will need to follow the guidance in this note to avoid potential problems.

PRACTICE AND PROCEDURE

Court of Protection User Group Minutes

These have now been published and are available [here](#). The next meeting, which is open to anyone who wishes to attend, will be held on 11 October 2017 at First Avenue House in London.

Serious Medical Treatment cases and litigation friends

As reported by (amongst others) the *Guardian*, the mother of a woman in her 50s has been appointed as litigation friend in proceedings designed to secure a determination that the continued provision of life-sustaining treatment is not in her best interests.¹ It will be very interesting in due course to see how – if at all – the presentation of the case on her behalf will differ from that adopted by the Official Solicitor, who, to date, has almost invariably acted as litigation in friend in such cases.

Potential new role for the Court of Protection

It is possible that the Court of Protection will be designated as the court which can appoint a guardian for a missing person under the Guardianship (Missing Persons) Act 2017 (the other alternative being the High Court: see s.23(1)). The Act enables the appointment by the court of a person (“the guardian”) to act for a missing person, who, by reason of being missing, is not able to act in relation to his or her property and financial affairs. The guardian will be supervised by the Office of the Public Guardian and will be required to file accounts in much the same way as a Deputy appointed under the MCA 2005. It is unclear as yet when the Act will be brought into force.

¹ Tor being instructed by the mother on her daughter’s behalf, she has not had input into this note.

THE WIDER CONTEXT

Election Corner

Social welfare issues have received more attention than might have been anticipated in the run up to the general election. There has been much heated debate in the media with headline grabbing stories about Theresa May's "dementia tax" U-turn. Here we consider what the three main parties in England are promising in their manifestos that may be of interest to our readers and the implications after the next election.

In their last manifesto in 2015, the Conservative Party pledged to "cap charges for residential social care from April 2016... so no one has to sell their home". Their commitment was to limit an individual's lifetime liability for care costs to £72,000. It followed a report from the Dilnot Commission in 2011 which recommended a cap on care costs at £35,000. In July 2015, just two months after the general election, the Conservative government announced that the cap on care costs would be delayed until April 2020. The Conservative Party manifesto, published on 18 May 2017, conspicuously made no mention of the cap on care costs. Instead, it proposed three main changes to our system of care for the elderly:

- Means-testing for domiciliary care would include the value of the family home;
- Raising the means test threshold from £23,250 to £100,000;
- Extending deferred payments for residential care to those receiving care at home.

The Health Secretary, Jeremy Hunt, appeared to confirm on the BBC Radio 4 Today programme that the Conservative Party was indeed dropping the proposed cap on care costs. However, after days of speculation and outrage over this so-called "dementia tax", Theresa May announced on 22 May that there would be an "absolute limit" on the amount that people would have to pay for their care. However,

she did not confirm any figures but said that this would be the subject of consultation in a Green Paper after the election.

It is welcome news that the Conservative Party remains committed to introducing a cap on care costs, as well as raising the asset threshold in the means test, which were both central recommendations of the Dilnot Commission in 2011. However, the lack of detail regarding the level of the cap and when it will come into effect is unnerving. Indeed, the promise of a Green Paper after the election may suggest that earlier policies are being reconsidered.

Both the Labour Party and the Liberal Democrat Party have expressly committed to implementing the lifetime cap on care costs in their manifestos. The Labour Party also intends to increase the asset threshold in the means test but no precise figures are given. However, the Labour Party has pledged to increase social care budgets in the short term (by £8 billion over the lifetime of the next Parliament) and to build a National Care Service alongside the NHS in the long term with joint working arrangements. Better integration between health and social care services has been an aspiration for successive governments but it remains a challenge to envisage the two systems operating symbiotically without more fundamental reforms especially to address practical problems arising from the funding crisis.

All three manifestos are varyingly vague about how the fundamental problem of funding and resources for health and social care in this country is going to be resolved. In relation to mental health, the Conservative Party manifesto commits to recruiting up to 10,000 more mental health professionals. It is not at all clear where these mental health professionals will be drawn from especially with the impact that Brexit might have on the health and social care workforce. The Conservative Party has also pledged to reform the Mental Health Act 1983 but precisely how remains unclear:

The current Mental Health Act does not operate as it should: if you are put on a

community treatment order it is very difficult to be discharged; sectioning is too often used to detain rather than treat; families' information about their loved ones is severely curtailed – parents can be the last to learn that their son or daughter has been sectioned. So we will introduce the first new Mental Health Bill for thirty-five years, putting parity of esteem at the heart of treatment.

Community Treatment Orders (CTOs) were of course introduced by the Mental Health Act 2007 with the aim of reducing readmission to in-patient hospital care. Although parity of esteem is a laudable aim, it is not at all clear how we would get there under the new Mental Health Bill which would appear to include reform to CTOs, sectioning and the provision of information, but provides little very little detail on complex issues of balancing patients' rights to autonomy and risks of harm.

The Labour Party has committed to ring-fencing mental health budgets and ensuring that funding reaches the frontline. The manifesto focuses particularly on the interests of children and young people by promising that children will no longer be treated on adult wards and ending out-of-area placements by 2019. There would also be access to a counselling service for all children in secondary school. There can be little doubt that achieving these aims within existing mental health budgets will be challenging and may have to come at the expense of funding for other much needed services.

The Liberal Democrat Party has committed to providing an extra £1 billion funding for mental health services which would be drawn from their 1p rise on income tax rates. The extra investment would be used to fund increase access to talking therapies, reform perinatal mental health, explore introducing a dedicated service for children and young people, roll out access and waiting time standards, and end out-of-area placements. In the long term, the Lib Dem Party would introduce a dedicated health and care tax (possibly based on reform of National Insurance)

which would bring together spending in both service streams.

There are commendable proposals in all three manifestos but the biggest challenge, as ever, appears to be ensuring adequate funding to sustain these well-intentioned policies. The Labour Party, which (when in Government) signed the UN Convention on the Rights of Persons with Disabilities (CRPD), is the only one of the three mainstream parties that has committed to incorporating the CRPD into UK domestic law. Not only would such a proposal entail a large spending commitment, it would also have significant implications on substantive areas of law including aspects of the Mental Capacity Act 2005. Those interested in reading about the substantive aspects of the MCA and CRPD may want to read this [discussion paper](#): as well as the [reports](#) of the Essex Autonomy Project to which Alex has contributed. We recall also that the report of the UN Committee on the Rights of Persons with Disabilities in 2016 found that there had been “grave or systemic” violations of the CPRD in the UK (the report, and the follow-up, can usefully be accessed [here](#)).

Royal College of GP Safeguarding Adults E-Learning

The RCGP has just published a very useful e-learning package on safeguarding (including MCA aspects). It is available free (on registration) [here](#).

Advance Decisions pack published

Compassion in Dying² has launched a new free Advance Decision pack, including an Advance Decision form, supporting guidance notes, and a Notice of Advance Decision card for people to carry with them.

The new Advance Decision form was designed in collaboration with service users, clinicians and lawyers to ensure it is straightforward, concise, and clear to follow. The accompanying guidance notes

² Full disclosure, Tor is Chair of the charity.

explain how to complete the form and offer further information about capacity, life-sustaining treatment, and Lasting Powers of Attorney for Health and Welfare.

Importantly, the form can be personalised for each patient. By taking them through different scenarios in which they may lose capacity, such as dementia and brain injury, people are prompted to consider what treatment they would want in these situations. There is also space to include things that are important to them in relation to their health, care, and quality of life.

Once completed they will have a personalised Advance Decision to sign, witness and share with their loved ones, GP and anyone else involved with their care.

For a free pack visit [here](#), or contact or contact Compassion in Dying on 0800 999 2434 or info@compassionindying.org.uk

Update about assisted dying challenge

The challenge to the ban on assisted dying contained in s.2(1) Suicide Act 1961 being brought by Noel Conway is now proceeding to a substantive hearing listed for 5 days starting on 17 July 2017.

European Committee for the Prevention of Torture UK report published

The Council of Europe CPT's report following their inspection visit to the UK in 2016 has now been [published](#). Of particular interest are the Committee's observations on psychiatric detention and treatment, including, in particular the recommendations:

1. that the relevant legislation should be amended so as to require an immediate external psychiatric opinion in any case where a patient (from context, with capacity) does not agree with the treatment proposed by the establishment's doctors, and, importantly, that patients should be able to appeal against a compulsory treatment decision to the Mental Health Tribunal, being informed of this right in writing. The Committee

expressly relied in making this recommendation (at para 175) on *X v Finland* [2012] ECHR 1371, a decision whose implications it is increasingly hard to ignore;

2. that the relevant legal provisions be amended and that in the meantime, the Mental Health Tribunal institute a practice of yearly reviews for all patients placed involuntarily in hospital, and further that patients transferred from either prison or from a less secure hospital should automatically trigger a review by the Mental Health Tribunal of the transfer measure.

Cross-border protection of vulnerable adults: the EU en marche?

The European Parliament approved on 1 June a resolution urging wider EU-wide adoption of the 2000 Hague Convention on the International Protection of Adults and asking the European Commission to draft a regulation for mutual automatic recognition and enforcement of decisions by member states on the protection of vulnerable adults and mandates in anticipation of incapacity. The resolution calls upon the Commission to submit a draft regulation by 31 March 2018.

The principles and aims of the proposal merit reproduction in full as they provide a useful outline of what the European Parliament has in mind. The intention is to:

1. Foster the provision of information about the administrative and judicial decisions concerning vulnerable adults who are the subject of protection measures as defined by the Hague Convention of 13 January 2000 on the international protection of adults, and facilitate the circulation, recognition and enforcement of such decisions.
2. Set up national files concerning or registers of, on the one hand, administrative and judicial decisions setting out protection measures in respect of vulnerable adults and, on the other hand, the relevant mandates in anticipation of

- incapacity, where such mandates exist, in order to guarantee legal certainty and facilitate the circulation of, and prompt access by the competent authorities and judges to, information concerning the legal situation of persons who are the subject of a protection measure.
3. Implement specific and appropriate measures to foster cooperation among the Member States, drawing on the instruments available under the Hague Convention, including the designation of central authorities responsible for facilitating communication among the competent Member State authorities and coordinating the forwarding and exchange of information concerning the administrative and judicial decisions in respect of adults who are the subject of protection measures.
 4. Ensure that the sharing between Member States of information concerning the protection status of vulnerable adults, and the access to files and registers containing details of protection measures and mandates in anticipation of incapacity, is organised in a manner which is entirely consistent with the principle of confidentiality and the rules on the protection of the personal data of the adults concerned.
 5. Introduce single Union forms designed to foster the provision of information about administrative and judicial decisions in respect of vulnerable adults and the circulation, recognition and enforcement of decisions concerning them. The Commission could draw on the model forms recommended by the Special Commission of a Diplomatic Character of the Hague Conference on Private International Law and included in the proceedings of the session of September-October 1999 on the protection of adults.
 6. Grant any person who is given responsibility for protecting the person or the property of a vulnerable adult the right to obtain within a reasonable period a certificate, which would be valid in all the Member States, specifying his or her status and the powers which have been conferred on him or her.
 7. Foster the automatic recognition in the Member States of protection measures taken by the authorities of a Member State, without prejudice to the introduction, as an exception and in keeping with Articles 3 and 21 of the Charter of Fundamental Rights of the European Union, of legal safeguards to protect public order in the Member States requested to recognise such protection measures, which may justify the non-recognition and non-enforcement of such protection measures by those Member States.
 8. Foster the enforcement in the Member States of protection measures taken by the authorities of a Member State, without a declaration establishing the enforceability of such measures being required.
 9. Foster consultation and coordination among the Member States in cases in which the enforcement of a decision proposed by the authorities of a Member State could have logistical and financial implications for another Member State, so that the Member States concerned can reach agreement on the sharing of the costs associated with the protection measure. The consultation and coordination should always be conducted in a manner consistent with the interests of the vulnerable adult concerned and in full respect of his or her fundamental rights. The authorities concerned could submit proposals for alternative measures to the competent administrative or judicial authority, on the understanding that the final decision would rest with the authority in question.
 10. Introduce single mandate-in-anticipation-of-incapacity forms in order to facilitate the use of such mandates by the persons concerned, the well-informed consent for which should be verified by the relevant authorities, and ensure that such mandates can circulate, and be recognised and enforced.

My Life Films

After several years requesting that those who wish to promote their conferences or training events donate to Mind, it is time for a change. We will now be requesting that donations are made to the My Life Films charity, which creates – free – films for those with dementia capturing and celebrating their lives. For more about this innovative charity and the excellent work that they do, see [here](#). Of course, you should also keep donating to Mind...!

SCOTLAND

Editorial Note

Much of the Scotland Report this month is taken up with reports into how the law may – or should – look in future, revealing the accelerating pace of change in this area. Whilst the commentary here is prepared from a Scottish perspective, its insights are, at the level of principle, of much more general application.

Powers of Attorney

As the Journal of the Law Society of Scotland has reported, registrations of powers of attorney in Scotland have fallen sharply after several years of successive increases. 50,373 powers of attorney were registered with the Scottish Office of the Public Guardian in 2016, compared to 61,184 the previous year. The reasons for this fall, which is in contrast to the position in England and Wales, are not yet known, but undoubtedly merit further study.

The “bedroom tax”, a procedural point, and possible human rights issues

In *Secretary of State for Work and Pensions v (First) The City of Glasgow Council (Second) IB* [2017] CSIH 35, an Extra Division of the Inner House of the Court of Session upheld an appeal by the Secretary of State for Work and Pensions in which the central issue was the interpretation of “bedroom” in Regulation E13 inserted into the 2006 Regulations by the Housing Benefit and Universal Credit (Size Criteria) (Miscellaneous Amendments) Regulations 2013. Given the line of relevant authority which has already been established, the outcome of the appeal is in one sense unsurprising. For adult incapacity practitioners, it contains one procedural point of interest. For the absence of reference to human rights issues the decision is remarkable, particularly in a decision issued on 31st May 2017 and therefore shortly after publication by the UN Committee on the Rights of Persons with Disabilities of its Draft General Comment on the right of persons with disabilities to live independently and to be included in the community under Article 19 of the UN

Convention on the Rights of Persons with Disabilities (see next item).

The decision narrates that *IB* was tenant of a property comprising five main rooms plus kitchen and bathroom, rented from a housing association. This was her former family home, and when used as such there was no dispute that four of the rooms were bedrooms. *IB*’s housing benefit was reduced by 25% by Glasgow City Council on the basis that she was under-occupying the rented property by two bedrooms. *IB* successfully appealed that decision to the extent that the First-tier Tribunal decided that the property had three (not four) bedrooms because: “*What was formerly a fourth bedroom on the ground floor was a livingroom at the relevant date and had been for a number of years*”. The discount was accordingly reduced from 25% to 14%. An appeal by the Secretary of State to the Upper Tribunal was unsuccessful, but further appeal to the Inner House was successful.

IB is described in the decision as an adult single woman in her 50s who has a severe learning disability and autistic traits, unable to live on her own. Her sister and brother-in-law (“Mr and Mrs O”) had been appointed her guardians in February 2013. The terms of the guardianship order were not narrated. Following the death of *IB*’s mother in April 2005, she had gone to live with Mr and Mrs O. In the summer of 2009 she moved back into her own home. Mr and Mrs O moved there with her. Shortly after that move, a downstairs bedroom was converted into a living room for *IB*’s own use, in accordance with professional advice from a social worker. Mr and Mrs O continued to use the original living room. The First-tier Tribunal narrated in its decision that: “*Both parties require some privacy. In particular, the appellant can get unsettled and agitated and wants her own space to watch the television programmes she likes and listen to music. She has a television in her bedroom but does not use it. She has carers who call twice a week to take her out and spends some time in her living room with them*”. One would observe that the need for this arrangement, and the

professional advice to that effect, are unsurprising having regard to the brief description of *IB* as having a severe learning disability and autistic traits.

The essence of the decision by the Inner House is contained in three sentences: *“In our opinion the classification and description of a property used as a dwelling is a matter of fact to be determined objectively according to relevant factors such as size, layout and specification of the particular property in its vacant state. That classification cannot be changed except by structural alterations made with the landlord’s approval which have the result of changing the classification of the property having regard objectively to its potential use in a vacant state. Thus the classification of a property as having one or more bedrooms does not change depending on the actual needs of the occupants or how they use the rooms for whatever reason from time to time”*.

The point of procedural interest was that *IB* was simply designed in the pleadings in the case by her name and address, without reference to the guardianship order. Her Counsel had confirmed to the court that he was instructed by Mr and Mrs O as guardians. Counsel took no issue about the form of the proceedings which designed *IB* alone as second respondent. That would appear to be correct. *IB* was indeed the relevant party. The function of the guardians was to enable the exercise of her legal capacity in the matter.

Not addressed in the decision is the question whether the terms of Article 19 UN Convention on the Rights of Persons with Disabilities (“CRPD”) should have been taken into account in arriving at the decision. The terms of CRPD are not directly legally binding, but CRPD has been ratified without reservation by the UK Government. Article 19 requires states parties to recognise the equal right of all persons with disabilities to live in the community, with choices equal to others. This includes the right to choose place of residence, and where and with whom to live on an equal basis with others. Although no direct evidence on the point is narrated in the decision, it seems reasonable to anticipate that, as a consequence

of her autistic traits in particular, *IB* would not have been able to live in the house without the facility of a separate living room. It would appear that there would be an argument that what amounts to a financial penalty arising from her need for that provision, in order to live in the home of her choice, violates Article 19.

The court and other authorities involved in this matter were obliged to comply with the European Convention on Human Rights (“ECHR”). Article 8.1 guarantees everyone’s right to respect for private and family life, and his or her home. Article 8.2 contains exceptions. Only one exception could be of possible relevance. That would be that an interference with the Article 8.1 right is “necessary in a democratic society in the interests of ... economic wellbeing of the country”. It seems improbable, however, that the costs to the public purse of ending *IB*’s current living arrangements would have been less than the reduction in housing benefit resulting from the decision, therefore it seems improbable that this exception would have applied. Moreover, although Article 19 of CRPD is not binding and Article 8 of ECHR is binding, it would seem reasonable to have regard to the UK’s ratification of CRPD (and thus of Article 19 of CRPD) in interpreting Article 8.

If there was a violation of Article 8, then there would also appear to have been a violation of Article 14, which prohibits discrimination in relation to any Convention right. The decision appears to accept that if *IB*’s disabilities had been physical, and to meet those disabilities a bedroom had been converted to a wet room with landlord’s permission, then it would no longer have been classed as a “bedroom” for the purpose of the 2013 Regulations. It is difficult to see that it would be other than discriminatory to disallow a non-physical alteration of use as an equally important consequence of a non-physical condition which is intellectually equally disabling.

Adrian D Ward

Draft General Comment on Article 19 of the UN Convention on the Rights of Persons with Disabilities (“CRPD”)

The UN Committee on the Rights of Persons with Disabilities (“UN Committee”) has issued a “Call for comments on the draft General Comment on the right of persons with disabilities to live independently and be included in the community (article 19)”. The deadline for submissions is 30th June 2017. Aspects of Article 19 are described in the preceding item of this Report. The draft General Comment, naturally, is of much wider scope. It offers definitions of “independent living”, “community living”, “life settings outside of institutions” and “personal assistance”. It considers each of the paragraphs of Article 19 in turn. It suggests that the core elements of Article 19 are the following:

- a) To have legal capacity to decide where and with whom and how to live is a right for all persons with disabilities, irrespective of impairment;
- b) The right to choose where to live requires a realistic option of accessible housing to choose from;
- c) The right to live independently does not entail dependence on informal support from family and friends;
- d) To have access to basic personalised and human rights-based disability specific services;
- e) To have access to basic mainstream community-based services and support on an equal basis with others; and
- f) The possibility of living independently must not be negatively affected by measures taken to respond to economic constraints.

The case described in the preceding item could be seen as engaging, in particular, item f) of the foregoing.

The draft then proceeds to suggest what are the obligations of states parties in order to comply with

Article 19; the relationship of Article 19 with other provisions of CRPD, and a list of 12 suggested action points for implementation at national level.

Compliance with Article 19 is a particularly live issue in Scotland at this time. Practitioners are being consulted about situations in which people appear to be put under pressure to move from their own homes solely because savings might be possible if support were provided in a group setting. Such pressure is sometimes accompanied by a suggestion that a person could remain in their own home if they were to admit another disabled person on a board and lodging or similar basis. In its references to support services, the draft does contain a brief reference (in paragraph 67) to the requirement upon states parties to ensure access to justice and to provide appropriate legal advice, remedies and support, but this probably does not extend far enough to counter the assault upon the rights of people with disabilities currently imposed by Scottish Legal Aid Board, with policies that fail to allow solicitors adequate remunerated time to ascertain the will and preferences of people with intellectual disabilities, or to communicate with them adequately, directly or through their supporters, in accordance with their professional obligation to do so.

The draft perhaps requires strengthening in order to emphasise that its references to “deinstitutionalisation” refer not only to moving people out of large institutions, but to avoiding institutionalisation in any setting. It is probably also necessary to expand the brief reference to a “paradigm shift from the medical model to the human rights model of disability”. An institutionalised approach, treating people with disabilities as objects of care rather than holders of rights, can arise as much from social care models as from medical care models. Some of the worst generic deprivations of human rights which I have personally observed overseas have been in institutions designated as social care institutions, rather than as medical institutions; and issues at home such as the pressures upon people not to continue to reside in accommodation of their choice also arise from social

care approaches and assessments, rather than medicalised approaches. The draft does not appear to be explicit that the right to remain in an existing home is as much supported by Article 19 as the right to move into a home of one's choice.

Adrian D Ward

Mental Health and Capacity Law: the Case for Reform Report

Introduction

On 30th May 2017, the Mental Welfare Commission for Scotland and Centre for Mental Health and Capacity Law (Edinburgh Napier University) launched their joint report: *Mental Health and Capacity Law: the Case for Reform*. It represents the culmination of information and views gathered during a recent law reform scoping exercise.

At the start of the twenty-first century Scotland was regarded as a world leader in terms of principled and rights based mental health and capacity law. However, international human rights law and practices in this field have developed further and this has called into question the fundamental assumptions that underpin relevant Scottish legislation. There remains widespread support for the principles of the Adults with Incapacity (Scotland) Act 2000 and Mental Health (Care and Treatment) (Scotland) Act 2003. There is nevertheless concern that individuals may remain disempowered and unable to effectively assert their rights and that the balancing of safeguards and rights to appropriate care has been undermined by resource constraints.

With a view to further discussing and considering this the Commission and the Centre jointly held three stakeholder roundtable events during the autumn of 2016. The main topics for discussion were graded guardianship, the possibility of unified legislation and capacity issues. The aim of the discussion was to highlight and analyse key issues in Scottish mental health and capacity legislation and to review future

opportunities for reform. The matters explored and developed at these events form the basis of this report.

Human rights considerations

The conversations focused on the fact that although Scotland's laws and practice must continue to remain compatible with European Convention on Human Rights (ECHR) rights, the influence of the UN Convention on the Rights of Persons with Disabilities (CRPD) must also now be taken into consideration.³

In particular, the need to engage with the requirements of Article 12 CRPD (the right to equal recognition before the law) in terms of providing access to appropriate support so that persons with mental impairment are able to exercise legal capacity on an equal basis with others was considered. The Article 5 ECHR challenges presented by the *Bournewood* and *Cheshire West* rulings relating to persons who lack capacity and who may be deprived of their liberty in health and social care settings were further discussed. The message in *X v Finland* that Articles 5 and 8 ECHR considerations are separate in cases involving detention and potential non-consensual treatment was also noted.

The possibility of introducing unified mental health and capacity legislation, such as the Mental Capacity (Northern Ireland) Act 2016, in Scotland was also a topic for debate. We were particularly keen to explore views on whether the Northern Ireland Act's absence of a diagnostic threshold and enhanced support for the exercise of legal capacity provisions might be the most effective means by which to promote parity of esteem in terms of the care and treatment of persons with physical and mental health issues and meet both ECHR and CRPD requirements.

Such discussions also took place against a backdrop of the Scottish Government's announcement that it will conduct a review of the position of learning

³ The UK became a state party to the CRPD and its Optional Protocol in 2009.

disability and autism within the 2003 Act's definition of 'mental disorder' and its review of the 2000 Act to respond to both the CRPD and to the Article 5 ECHR deprivation of liberty case law.

Conclusions and recommendations

A number of broad themes arose from both the roundtable discussions and from information gathered during a Mental Welfare Commission parallel exercise involving discussions with people with lived experience and carers.

It was certainly agreed that if Scotland is to lead the field again we need to reform our own law. Moreover, more can and should be done to maximise the autonomy and exercise of legal capacity of persons with mental disorder including where non-consensual care and treatment is being considered and implemented.

In the short to mid-term such reform should involve strengthening the principles that underpin the 2000 and 2003 Acts and, firstly, amending the 2000 Act taking into account the Essex Autonomy Project *Three Jurisdictions Project* recommendations, building on graded guardianship proposals and replacing Parts 3 and 4 of the 2000 Act and DWP appointeeship. It would also involve an overhaul and revisiting of how mental capacity is assessed and whether the 2003 Act should continue to use 'significantly impaired decision-making ability' as a criterion for intervention. It was acknowledged and agreed that improving practice may be more important than changing legal tests and that there is a need to develop consistent cross-professional standards on the assessment of capacity.

It was also considered that there is a need to provide greater synergy between the 2000 and 2003 Acts and the Adult Support and Protection (Scotland) Act 2007 to ensure that where an individual potentially falls to be considered under more than one piece of legislation this is effectively and consistently achieved. There was strong support for a single judicial forum, probably the Mental Health Tribunal

for Scotland, to consider cases under both the 2003 and 2000 Acts and possibly even the 2007 Act.

Finally, whilst there did not appear to be an overall appetite for the immediate introduction of unified legislation amongst the stakeholders consulted, there did seem to be enthusiasm for increased convergence of mental health and capacity law over time.

Recommendations

In light of the above, the report therefore makes following recommendations:

Recommendation No. 1: There should be a long-term programme of law reform, covering all forms of non-consensual decision making affecting people with mental disorders. This should work towards a coherent and non-discriminatory legislative framework which reflects UNCRPD and ECHR requirements and gives effect to the rights, will and preferences of the individual. Further, in accordance with Article 4(3) UNCRPD, persons with lived experience of mental disorder must be actively consulted in any reform process.

Recommendation No. 2: The aim should be increased convergence of the legislation over time, particularly with respect to the criteria justifying intervention.

Recommendation No. 3: There should be a single judicial forum to oversee non-consensual interventions. The balance of views favoured the Mental Health Chamber of the new tribunal structure as the appropriate forum.

Recommendation No. 4: Within the reform programme, priority should be given to the problems with the law which have the most significant negative effect on the lives and rights of people who are subject to them. The first priority should be to reform the Adults with Incapacity (Scotland) Act 2000.

Recommendation No. 5: The Adults with Incapacity (Scotland) Act 2000 reform should build on proposals for ‘graded guardianship’, which have attracted widespread support. It should also take account of the proposals to address UNCRPD compliance set out in the Essex Autonomy Project *Three Jurisdictions Report*.

Recommendation No. 6: The ‘design principles’ set out in para 6(a) of Chapter Three should be used to guide reform relating to guardianship.

Recommendation No. 7: Graded guardianship should also replace parts 3 and 4 of the Adults with Incapacity (Scotland) Act 2000 and DWP appointeeship

Recommendation No. 8: As part of the programme of reform, consideration should be given to the replacement of the ‘SIDMA’ test in the Mental Health (Care and Treatment)(Scotland) 2003 by a capacity test. However, the priorities before considering such legislative change should be: (a) to improve practice and develop consistent standards across medicine, psychology and the law on the assessment of capacity and (b) to identify and implement practical steps to enhance decision making autonomy whenever non-consensual interventions are being considered.

It remains to be seen the extent to which these recommendations are given effect in mental health and capacity law, practice and policy. We do, however, live in interesting times for such law, practice and policy.

*Colin McKay,
Mental Welfare Commission for Scotland*

*Jill Stavert,
Centre for Mental Health and Capacity Law,
Edinburgh Napier University*

**Supported decision-making: learning from
Australia**

A further major contribution to current processes of law reform, and review of good practice, was issued last week. Jan Killeen’s contribution to the creation of Scotland’s adult incapacity regime and its further development, soundly based upon research, has been immense. Her research and contribution continues with the publication of this report, available [here](#). Jan writes in the Preface that: “Collaboration for change is central to the way I work”. She organised the first major Scottish conference on dementia in 1984, leading to the formation of Scottish Action on Dementia. She then played a major role a decade later in the merger of Scottish Action on Dementia and Alzheimer Scotland to become Alzheimer Scotland – Action on Dementia. In her role as Policy Director of that organisation she was the driving force behind the creation and subsequent success of the massive alliance that campaigned for introduction of the Adults with Incapacity (Scotland) Act 2000. She pushed others (including me!) into the limelight, but without her efforts that alliance would neither have existed nor have succeeded. The successor to the alliance was the implementation steering group for the 2000 Act, and Jan carried that work seamlessly forward into her research which led to her report “The Adults with Incapacity (Scotland) Act 2000: learning from experience” (Scottish Executive, 2004). Her report was the largest single influence behind the amendments to the 2000 Act by the Adult Support and Protection (Scotland) Act 2007.

We may confidently expect this latest report to have similarly substantial impact. It results from a six-week research trip to Australia facilitated by the Winston Churchill Memorial Trust. She selected Australia because it is the first country in the world to have piloted supported decision-making projects in response to the UN Convention on the Rights of Persons with Disabilities. The report describes and rigorously assesses the various different models of supported decision-making that Jan witnessed, and makes a series of recommendations. She concludes that the forthcoming review by the UN Committee on the Rights of persons with Disabilities of UK compliance with the Convention has the potential to be a welcome catalyst for change and, together with

the recent reviews of capacity/incapacity laws in the UK, represents an important step forward. She warns, however, that if governments are serious about ensuring equality of all citizens then additional resources will be needed to support the implementation of reformed capacity/incapacity legislation which complies with the UK's commitment to the Convention.

The report is packed with useful information and rigorous assessment, to the extent that it is almost impossible to precis: anyone engaged or interested in the current review of legislation, and reviews of best practice, should read it. The value of her work is enhanced by the care and caution with which she identifies positive features and outcomes of the Australian experience, but also identifies that a review of evaluations of Australian pilot schemes exposed flaws in the methodology, and identified gaps in research. She makes it clear that: "supported decision-making continues to be 'work-in-progress'".

There are two significant limitations to the work which she is able to report. One is acknowledged: that the pilot schemes did not address supported decision-making in the context of ageing conditions. The other, not explicitly stated, is that the pilot schemes, and in consequence Jan's research, are limited to decision-making, not to the significantly wider requirement of Article 12 of the Convention for support in exercising legal capacity. However, while this whole area is indeed "work-in-progress", Jan's report progresses it substantially.

Adrian Ward

Editors and Contributors



Alex Ruck Keene: alex.ruckkeene@39essex.com

Alex is recommended as a 'star junior' in Chambers & Partners for his Court of Protection work. He has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively, has numerous academic affiliations, including as Wellcome Trust Research Fellow at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. He is on secondment to the Law Commission working on the replacement for DOLS. To view full CV [click here](#).



Victoria Butler-Cole: vb@39essex.com

Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights', a contributor to 'Assessment of Mental Capacity' (Law Society/BMA 2009), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV [click here](#).



Neil Allen: neil.allen@39essex.com

Neil has particular interests in human rights, mental health and incapacity law and mainly practises in the Court of Protection. Also a lecturer at Manchester University, he teaches students in these fields, trains health, social care and legal professionals, and regularly publishes in academic books and journals. Neil is the Deputy Director of the University's Legal Advice Centre and a Trustee for a mental health charity. To view full CV [click here](#).



Annabel Lee: annabel.lee@39essex.com

Annabel appears frequently in the Court of Protection. Recently, she appeared in a High Court medical treatment case representing the family of a young man in a coma with a rare brain condition. She has also been instructed by local authorities, care homes and individuals in COP proceedings concerning a range of personal welfare and financial matters. Annabel also practices in the related field of human rights. To view full CV [click here](#).



Anna Bicarregui: anna.bicarregui@39essex.com

Anna regularly appears in the Court of Protection in cases concerning welfare issues and property and financial affairs. She acts on behalf of local authorities, family members and the Official Solicitor. Anna also provides training in COP related matters. Anna also practices in the fields of education and employment where she has particular expertise in discrimination/human rights issues. To view full CV [click here](#).

Editors and Contributors



Simon Edwards: simon.edwards@39essex.com

Simon has wide experience of private client work raising capacity issues, including *Day v Harris & Ors* [2013] 3 WLR 1560, centred on the question whether Sir Malcolm Arnold had given manuscripts of his compositions to his children when in a desperate state or later when he was a patient of the Court of Protection. He has also acted in many cases where deputies or attorneys have misused P's assets. To view full CV [click here](#).



Nicola Kohn: nicola.kohn@39essex.com

Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 4th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2015). To view full CV [click here](#).



Adrian Ward: adw@tcyoung.co.uk

Adrian is a practising Scottish solicitor, a consultant at T C Young LLP, who has specialised in and developed adult incapacity law in Scotland over more than three decades. Described in a court judgment as: “*the acknowledged master of this subject, and the person who has done more than any other practitioner in Scotland to advance this area of law,*” he is author of *Adult Incapacity*, *Adults with Incapacity Legislation* and several other books on the subject. To view full CV [click here](#).



Jill Stavert: j.stavert@napier.ac.uk

Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Capacity Law and Director of Research, The Business School, Edinburgh Napier University. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee, Alzheimer Scotland's Human Rights and Public Policy Committee, the South East Scotland Research Ethics Committee 1, and the Scottish Human Rights Commission Research Advisory Group. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2015 updated guidance on Deprivation of Liberty). To view full CV [click here](#).

Conferences

Conferences at which editors/contributors are speaking

Essex Autonomy Project Summer School

Alex is speaking at the Essex Autonomy Project Summer School in July, which this year has the theme *Objectivity, Risk and Powerlessness in Care Practices*. The multi-disciplinary programme will give delegates the opportunity to discuss the challenges of delivering care in a framework that supports and empowers individuals. For full details, and to apply online, please see the [Summer School website](#).

Deprivation of Liberty Safeguards: The Implications of the 2017 Law Commission Report

Alex is chairing and speaking at this conference in London on 14 July which looks both at the present and potential future state of the law in this area. For more details, see [here](#).

Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to the dementia charity [My Life Films](#) in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Our next Newsletter will be out in early July. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Report in the future please contact: marketing@39essex.com.

David Barnes
Chief Executive and Director of Clerking
david.barnes@39essex.com

Michael Kaplan
Senior Clerk
michael.kaplan@39essex.com

Sheraton Doyle
Senior Practice Manager
sheraton.doyle@39essex.com

Peter Campbell
Senior Practice Manager
peter.campbell@39essex.com



International
Arbitration Chambers
of the Year 2014
Legal 500

Environment & Planning
Chambers
of the Year 2015
Chambers UK

clerks@39essex.com • **DX: London/Chancery Lane 298** • 39essex.com

LONDON
81 Chancery Lane,
London WC2A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

MANCHESTER
82 King Street,
Manchester M2 4WQ
Tel: +44 (0)16 1870 0333
Fax: +44 (0)20 7353 3978

SINGAPORE
Maxwell Chambers,
#02-16 32, Maxwell Road
Singapore 069115
Tel: +(65) 6634 1336

KUALA LUMPUR
#02-9, Bangunan Sulaiman,
Jalan Sultan Hishamuddin
50000 Kuala Lumpur, Malaysia:
+(60)32 271 1085

39 Essex Chambers is an equal opportunities employer.

39 Essex Chambers LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number 0C360005) with its registered office at 81 Chancery Lane, London WC2A 1DD.

39 Essex Chambers' members provide legal and advocacy services as independent, self-employed barristers and no entity connected with 39 Essex Chambers provides any legal services.

39 Essex Chambers (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 81 Chancery Lane, London WC2A 1DD.